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Prisoners' Voting Rights

by

Philip A Joseph

Professor of Law

University of Canterbury

Introduction

We have much to thank serial litigant and prison inmate, Arthur Taylor, for. He has placed before the courts a tantalising array of public law issues, and not without some success. Two of his more notable wins were the overturning of the statutory regulations banning smoking in prisons (*Taylor v Manager of Auckland Prison* [2012] NZHC 3591) and the obtaining of the first formal declaration of inconsistency under the New Zealand Bill of Rights Act 1990 (*Taylor v Attorney-General* [2015] NZHC 1706, [2015] 3 NZLR 791). In the latter decision, the High Court granted a declaration that a statutory provision could not be reconciled as a reasonable limit on a protected right. Hard on the heels of that decision, Taylor launched a litigation sequel that promised more than a declaration of inconsistency: he challenged the legal validity of the statutory provision that was the subject of the declaration. It was enacted, he claimed, in contravention of the entrenching procedures under s 268 of the Electoral Act 1993. This would have been Taylor's coup de maître, a masterstroke that would have reinstated prisoners' voting rights at general elections. Unhappily for him, however, Fogarty J did not agree with his argument and dismissed the challenge.

This commentary examines the issue of statutory interpretation that Taylor's challenge raised. Loathe as I am to disagree with the learned Judge, I believe Taylor's argument was correct and that the impugned provision was enacted in breach of the Electoral Act 1993. The following sets out the contesting arguments and explains why Taylor's interpretation of the entrenching section (s 268) is to be preferred. The discussion also records conflicting parliamentary statements that support each of the competing interpretations, reinforcing the palpable ambiguity that besets s 268(1)(e).

The statutory framework

The relevant part of s 268 of the Electoral Act 1993 reads:

268 Restriction on amendment or repeal of certain provisions

- (1) This section applies to the following provisions (hereinafter referred to as **reserved provisions**), namely,
 - (e) section 74, and the definition of the term adult in section 3(1), and section 60(f), so far as those provisions prescribe 18 years as the minimum age for persons qualified to be registered as electors or to vote:
- (2) No reserved provision shall be repealed or amended unless the proposal for the amendment or repeal –
 - (a) is passed by a majority of 75% of all the members of the House of Representatives; or
 - (b) has been carried by a majority of the valid votes cast at a poll of the electors of the General and Maori electoral districts.

Section 74 defines the qualification of electors that entitles persons to vote. The relevant part reads:

74 Qualification of electors

- (1) Subject to the provisions of this Act, every adult person is qualified to be registered as an elector of an electoral district if –
 - (a) that person is –
 - (i) a New Zealand citizen; or
 - (ii) a permanent resident of New Zealand; and
 - (b) that person has at some time resided continuously in New Zealand for a period of not less than 1 year.”

Section 60, titled “Who may vote”, entitles inter alia any person qualified to be registered as an elector of an electoral district to vote in a general election.

Taylor’s challenge was to s 4 of the Electoral (Disqualification of Sentenced Prisoners) Amendment Act 2010, which reads:

4 Disqualifications for registration

Section 80(1) is amended by repealing paragraph (d) and substituting the following paragraph:

- “(d) a person who is detained in a prison pursuant to a sentence of imprisonment imposed after the commencement of the Electoral (Disqualification of Sentenced Prisoners) Amendment Act 2010.”

Section 80 sets out the classes of person who are disqualified for registration as electors and are ineligible to vote or stand for election to Parliament. It was common ground that s 4 of the 2010 amendment Act was passed by a bare majority of the House of Representatives (*Taylor v Attorney-General* [2016] NZHC 355 at [3]). In *Taylor v Attorney-General* [2015] NZHC 1706, [2015] 3 NZLR 791 at [79], Heath J had granted a declaration that s 4 was an unreasonable limit on the right to vote affirmed by s 12 of the New Zealand Bill of Rights Act 1990. The question in *Taylor v Attorney-General* [2016] NZHC 355 was whether that section had been enacted in breach of s 268 of the Electoral Act 1993 and was invalid, unlawful and of no effect.

The contesting interpretations

The applicant argued that s 268(1)(e) meant what it said. The section begins with the recital, “This section applies to the following provisions (hereinafter referred to as **reserved provisions**)”, and para (e) lists “Section 74 of this Act”. Parliament, the applicant argued, intended to reserve the whole of s 74, and those parts of s3(1) and s 60(f) that define “adult” as a person of or over the age of 18 years. Under s 74, only adult persons are qualified to be registered as electors.

In contrast, the respondents advanced a minimalist interpretation that sought to read down the reference in para (e) to s 74. The Crown argued that s 74 was a reserved section only to the extent that it referred to “adult”, meaning a person 18 years or over. Counsel emphasised the qualifying words in para (e), “so far as those provisions prescribe 18 years as the minimum age for persons qualified to be registered as electors or to vote”. The Crown argued that those qualifying words necessarily referred to all three sections listed: namely, ss 74, 3(1) and 60(f). The applicant, on the other hand, contended that the qualifying words referred only to ss 3(1) and 60(f), which prescribed 18 years under the definition of adult (s 3(1)) or as the minimum voting age for members of the Defence Force serving overseas (s 60(f)).

The High Court decision

Fogarty J held for the Crown and concluded that there was only one tenable meaning of s 268(1)(e): ss 74, 3(1) and 60(f) were reserved provisions only to the extent that they prescribe 18 years as the minimum age for voting. Accordingly, s 4 of the 2010 amending Act was valid as the amendment of the right of prisoners to vote was not amending a reserved provision. His Honour resolved that the critical word in para (e) was “those”. The qualifying words were, “so far as *those* provisions prescribe 18 years ...” He reasoned (at [107]):

“There are three provisions referred to in subs (1)(e). Why should ‘those’ refer to two of the three and not all three? How can you determine which lesser number they refer to if they do not refer to the whole? In my view, the natural meaning of ‘those’ is that it refers to all three provisions listed in subpara (e) ... ‘[T]hose’ refers to s 74, s 3(1) and s 60(f).”

Commentary

Fogarty J’s judgment was thoughtful and considered, addressing questions ranging beyond the immediate legal issue for decision. It traversed New Zealand’s constitutional history and attendant legitimacy ([48]-[68]), and the ability of the governmental system to respond to the “needs, qualities and aspirations of the people” ([55]). The judgment was also courteous and restrained. The applicant advanced several subsidiary grounds of challenge that were patently non-justiciable – grounds the Judge rightly termed “hopeless” (at [25]).

This commentary focuses on the issue of statutory interpretation that was central to the case. Fogarty J’s reasoning why the Crown’s interpretation was to be preferred was, it has to be said, mechanistic and superficial. His Honour presciently asked: “Why should ‘those’ refer to two of the three and not all three [meaning the three provisions listed in s 268(1)(e)]?” Perhaps the answer is because only two of the listed provisions prescribe 18 years as the minimum voting age. Recall that the qualifying words in s 268(1)(e) read: “so far as those provisions prescribe 18 years as the minimum age for persons qualified to be registered as electors or to vote.” Section 3(1) defines the term “adult” for purposes of the Act thus: “adult – (a) means a person of or over the age of 18 years.” To similar effect, s 60(f) prescribes 18 years as the minimum voting age for members of the Defence Force serving overseas.

Section 74 stands in marked contrast. This provision is silent on the voting age of 18 years. It refers simply to the term “adult”; it defines the qualification of electors in terms of “every adult person”. This reveals Parliament’s commitment to make s 74 a reserved section in its entirety. It was necessary to protect the prescribed voting age of 18 years under the definition of “adult” (s 3(1)) and the right of defence personnel serving overseas to vote (s 60(f)) *in order to* protect against backdoor amendment of s 74. Were those provisions not reserved and protected against ordinary amendment, a government could use a bare majority of the House to amend the voting age and alter the qualification of electors.

There are additional reasons why the interpretation that Taylor advanced is preferred. The whole of s 74, comprising subs (1) and (2), is listed in s 268(1)(e) as a reserved provision. Subsection (2) provides extended machinery for determining the appropriate electoral district in which an elector

qualified under subs (1) may vote. No reference is made to the qualified voting age (or the definition of “adult” which prescribes it), yet it is listed as part of the reserved provision (s 74). The obvious and logical conclusion is that the whole of s 74 is reserved.

The scheme of s 268(1) reinforces this analysis. Each of paras (a) – (f) of subs (1) lists as a reserved provision a single enumerated section, followed either by an explanation of each section’s subject-matter or the listing of further reserved provisions to protect against back door amendment of the reserved section. Paragraph (c) of subs (1) is a companion provision to para (e). This lists s 35 as a reserved provision, and also the definition of the term “General electoral population” in s 3(1). Section 35, the reserved provision, establishes the machinery for dividing New Zealand into General electoral districts following each census. It was necessary to protect the definition of “General electoral population” against ordinary amendment as the statutory formula under s 35 entails mathematical calculations based on the General electoral population. An amendment of that definition would effectively amend s 35 also.

The applicant advanced several arguments which lend credence to the interpretation preferred here. First, the phrase “those provisions” in the qualifying words of para (e), it was argued, refers only to ss 3(1) and 60(f), which are compendious provisions covering diverse topics most of which are of no relevance to s 74 and the qualification of electors. The proviso beginning “so far as” ensures that it is only those parts of ss 3(1) and 60(f) that address the minimum voting age that are reserved. Section 3(1) (the Act’s interpretation clause), for example, contains 65 definitions, 63 of which have no bearing on the qualification of electors or the right to vote. Likewise, s 60 deals with sundry matters but only para (f) refers to the voting age of 18 years. The qualifying words “so far as” make obvious good sense.

Secondly, the applicant argued that, on the Crown’s interpretation of s 268(1)(e), reference to s 74 in para (e) would have been superfluous and of no purpose. He submitted that (*Taylor v Attorney-General* [2016] NZHC 355 at [95]):

“The whole of s 74 of the Act is entrenched because [otherwise] there would be no purpose in listing s 74 at all in s 268(1)(e). The term ‘adult’ is defined in the interpretation section (s 3) so it would be redundant to mention s 74.”

The applicant observed that s 74 embraces a raft of matters, including one’s citizenship or permanent residence and length of time one has resided continuously in an electoral district, in addition to the minimum voting age. All of those matters bear upon the qualification of electors under s 74 and, the applicant argued, are reserved provisions.

Finally, the applicant relied on a passage from my text *Constitutional and Administrative Law in New Zealand* (4th ed, Thomson Reuters, Wellington, 2014) at [16.7.1] to show that the whole of s 74 is reserved. There, I wrote that s 268 entrenches six key machinery sections, including “s 74, which establishes the qualification of electors (including the voting age and definition of adult in ss 3(1) and 60(f)” (quoted in the judgment at [96]). However, the learned Judge observed (at [108]) that mine was not an extended analysis but merely a summary of the position, and doubted whether I had alluded to the issue before the Court. “I assume he has not,” His Honour concluded, “because if he had, he would have discussed the issue, it being significant.” I cannot recall whether or not I did allude to the issue but I entertain no doubt as to which of the two contesting interpretations is the correct one.

Conflicting parliamentary explanations

The ambiguity that underpins s 268(1)(e) materialised in the parliamentary debates on the Electoral Acts of 1956 and 1993. In the second reading debates on the Electoral Bill in 1956, Hon Jack Marshall informed the House ((1956) 310 NZPD 17140 (emphasis added)):

“The provisions which are reserved are six in number. They are the provisions relating to the life of Parliament, the method of voting, the constitution and order of reference of the Representation Commission, *the age of voting*, the total population, and the tolerance of 5 per cent.”

In contrast, in the second reading debates on the Electoral Bill in 1993, Hon Paul East stated ((1993) 537 NZPD 17140 (emphasis added)):

“The provisions that are entrenched [as reserved sections] preserve the term of Parliament, the establishment of the Representation Commission, the division of New Zealand into electoral districts, *the qualification of voters to vote*, and the method of voting by secret ballot.”

The ambiguity is palpable, depending on how one reads the words of s 268(1)(e). However, the logic of the argument clearly drives the interpretation that East adopted. His was a more exact summation of the entrenching provision. First, unlike Marshall, he did not allude to the minimum age of voting as it was unnecessary to do so. The qualification of voters under s 74 implicitly incorporates the age of 18 years through the definition of “adult” in s 3(1). Secondly, Marshall recounted that the definition of “total population” was reserved, although what he meant to say was “European population”. At that time, the term “European population” was key to the division of

New Zealand into European electoral districts. Again, however, this was in error. The reserved provision was, in fact, s 16 which provided the machinery for dividing New Zealand into European electorates. The definition of “European population” was reserved simply in order to prevent backdoor amendment of that machinery. East did not fall into the same error. He correctly identified the machinery for dividing New Zealand into electoral districts as the reserved subject.

Conclusion

The applicant’s interpretation of s 268(1)(e) is the preferable and logical one. On that interpretation, s 4 of the 2010 amendment Act was enacted in breach of the mandatory requirements of s 268 of the Electoral Act 1993, and is legally invalid. This, if true, is chilling because successive governments have altered the law on prisoners’ voting rights on the strength of the alternative interpretation that the Crown advanced. These statutory amendments go back to 1956, when the entrenching provision was introduced into the legislation (Electoral Act 1956, s 189). None of the post-1956 amendments complied with the “manner and form” procedures under the entrenching section for amending the reserved sections. It would be disturbing if successive generations of prisoners had been denied their right to vote under legislation that was invalid but never legally challenged.

Mr Taylor would be advised to appeal the High Court decision. The qualification of electors conferring the right to vote is of fundamental importance to a representative democracy. It should not surprise that Parliament included the qualification of electors in the list of reserved provisions. Perhaps the difficulty for Mr Taylor might be in raising the \$3,880.00 required for his day in court (plus \$1,350 for each additional half day or part thereof if required). That sum represents the filing and associated fees incurred in taking an appeal to the Court of Appeal. Perhaps one should take up a collection for Mr Taylor to ensure he has his day.